Teriong v. ROP, 15 ROP 88 (2008)
TEKAU TERIONG,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 07-004
Criminal Case No. 06-184

Supreme Court, Appellate Division
Republic of Palau

Argued: March 25, 2008
Decided: April 18, 2008

Counsel for Appellant: Ben Carter
Counsel for Appellee: Ronald K. Ledgerwood

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

SALII, Justice:

Both parties ask us to decide whether, as a general matter, a trial court has authority to order work release at sentencing. We decline the invitation and limit our decision to the question before us: whether a sentencing court may order or recommend work release for a criminal defendant convicted of firearms possession, a crime that carries a mandatory minimum sentence. We hold in the negative and affirm the judgment below.
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BACKGROUND

Pursuant to a plea agreement, Appellant Tekau Teriong pleaded guilty to one count of possession of a firearm under 17 PNC § 3306. The plea agreement allowed Appellant the opportunity to argue for work release at the sentencing hearing. Appellant and the Republic of Palau submitted sentencing memoranda, and the trial court held that sole authority to order work release lies with the Parole Board. The trial court acknowledged that courts in Palau "have a history of ordering work release as a component of the sentencing phase" but stated that under the Constitution it is the legislature that determines a court's sentencing authority. The court then analyzed 18 PNC § 1208, part of the Parole Reform Act of 1992, which grants authority to the Parole Board to order work release subject to certain conditions and upon consideration of

various factors. The trial court posited that because these conditions and factors arise only after the defendant has served a portion of his sentence, a trial court cannot have the authority to weigh such factors *ex ante* and order work release at the time of sentencing.

The trial court next discussed whether it could issue a recommendation to the Parole Board that Appellant be granted work release as contemplated by 18 PNC § 1209 and 1211(a)(4). The trial court held that because the defendant pleaded guilty to a crime with a constitutional mandatory minimum sentence of imprisonment, appellant was not eligible for work-release. The trial court sentenced appellant to 15 years imprisonment.

STANDARD OF REVIEW

This court reviews the trial court's conclusions of law regarding the authority to grant or recommend work release *de novo*. *See Roman Tmetuchl Family Trust v. Whipps,* 8 ROP Intrm. 317, 318 (2001).

DISCUSSION

We are presented today with the question that was explicitly left open in *Ongalibang v. ROP*, 8 ROP Intrm. 219, 220-221 (2000). In that case, the defendant pleaded guilty to attempted firearms possession in violation of 17 PNC § 3306(a) and 17 PNC § 104. The trial court held that "it had no discretion to order work release for this offense because of a statutory mandatory minimum sentence." *Ongalibang,* 8 ROP Intrm. at 220 (internal quotations omitted). The appellate division reversed, holding that there is no mandatory minimum sentence for attempted firearms possession and "le[ft] for another day whether a true mandatory minimum sentence would require a different result." *Id*. at 220-21.

That day has arrived, and we begin with the trial court's holding that it could not order work release as part of its Sentencing Order. Although we do not paint with as broad a brush, we agree. Article XII, Section 13 of the Constitution of the Republic of Palau directs the Olbiil Era Kelulau to "establish a mandatory minimum imprisonment of fifteen (15) years for violation of any law regarding importation, possession, use or manufacture of firearms." Based on that directive, the statute under which appellant was convicted provides that any violator "shall . . . be imprisoned for not less than 15 years." 17 PNC § 3306.

Appellant submits that work release as it exists in Palau is a form of imprisonment sufficient ⊥90 to satisfy both the Constitution and the statute. Work release requires a prisoner to return to the prison to sleep each night; a prisoner on work release is liable for escape if he does not return to the jail in the evening; and a work release prisoner receives credit toward his or her sentence even while released to attend work. This, says Appellant, proves that work release specifies a type of imprisonment, rather than a type of parole or release. Prisoners on work release therefore remain within the institution's "extended limits" although not within its physical limits.

But when the OEK enacted the Parole Reform Act of 1992, it declared that work release

is a type of parole and not a type of imprisonment. "'Parole' means *full or partial release from imprisonment* under the provisions of this chapter or prior legislation, rules or regulations, *and includes work or school release.*" 18 PNC § 1202(b) (emphasis added). The plain language of the statute dictates that one who is on work release cannot also be imprisoned. This does not satisfy the required mandatory minimum sentence in § 3306.

Appellant relies on the silence of the legislature following the passage of the Parole Reform Act in 1992 as evidence of the legislature's tacit approval of courts ordering work release at sentencing for those convicted of firearms possession.[1] Appellant points us only to one unpublished opinion from the trial division granting work release, without discussion, for a defendant convicted of firearms possession. *See Republic of Palau v. Ngiraingas,* Criminal Case No. 255-97 (Tr. Div. 1997). This is hardly the type of judicial interpretation of a statute that could support an inference of implied legislative approval of the practice employed in *Ngiraingas.* Appellant also cites 34 PNC § 3301, which explicitly excludes drug traffickers from eligibility for work release. Relying on the principle of *expressio unius est exclusio alterius,* Appellant argues this demonstrates the legislature's intent to exclude only drug traffickers from work release, and not those who possess firearms. But the explicit exclusion in § 3301 cannot overcome the inescapable conclusion from our reading of the Constitution, 17 PNC § 3306 and 18 PNC § 1202(b) that work release, as a type of parole, is unavailable to sentencing courts for those who are convicted of a firearms possession crime that carries with it a mandatory minimum sentence of imprisonment.

We find *Ngemaes v. ROP,* 4 ROP Intrm. 250 (1994), more instructive on legislative intent regarding departure from mandatory minimum sentences in firearms possession cases. In *Ngemaes,* the Appellate Division held that "the sentencing court is prohibited from suspending any portion of the minimum term" of imprisonment because suspension of a sentence is not "actual imprisonment." *Ngemaes,* 4 ROP Intrm. at 250, 252. The Court noted that "statutes [must] be interpreted whenever possible ⊥91 to avoid inconsistency with the Constitution" and that the minimum punishment of imprisonment is mandated by Article XII, Section 13 of the Constitution as well as 17 PNC § 3306. *Id*. at 253. The Court also relied on the legislative history of the Firearms Control Act to "confirm[] that in passing the Firearms Control Act the OEK meant to implement the directive found in the firearms clause of the Palau Constitution, and to establish a mandatory minimum term of imprisonment of 15 years." *Id*. To be sure, granting work release is a different beast than suspending a sentence. But the Court's analysis in *Ngemaes* bolsters our conclusion that the legislature intended those convicted for firearms offenses to serve "actual imprisonment" and allowing sentencing courts to order work release thwarts this intent.

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[1] Appellant also suggests that the legislature tacitly approved of sentencing courts ordering work release when it "revisited" the Parole Reform Act in 1999 through RPPL 5-34. That law, the Fiscal Year 2000 National Budget Act, authorized for appropriation over $60 million in funds for numerous "general operations" for the Republic of Palau. We do not consider a slight change in the compensation of Parole Board members contained in the National Budget Act as evidence of any substantive consideration by the legislature of the Parole Reform Act.

Appellant finally argues that it is for the judiciary, and not the OEK, to interpret what constitutes imprisonment. Although it is the province of the courts to interpret the Constitutional meaning of "imprisonment" within Article XII, Section 13, both parties agree that the OEK has sole authority to "prescribe the types and limits of punishments for particular crimes, and the courts must defer to legislative policy judgments in that regard." *Gotina v. ROP*, 8 ROP Intrm. 56, 59-60 (1999). Here, the OEK enacted a punishment pursuant to a constitutional directive. Neither party questions whether the OEK complied with its Constitutional mandate in enacting 17 PNC § 3306, so the meaning of "imprisonment" that concerns us presently is the meaning in the statute. The OEK has decided that work release is a type of parole and therefore a full or partial release from imprisonment. Even if work release were viewed as only a partial release from imprisonment, one cannot be imprisoned while at the same time enjoying a partial release from imprisonment. The OEK followed the directive of the Constitution by implementing a sentence of actual physical confinement for the minimum period and we are not at liberty to disrupt this judgment.[2]

Because we hold only that work release is not available to persons convicted of firearms possession, we decline, as the court did in *Ongalibang,* to address the general authority of the courts to order work release at sentencing for crimes that do not carry a mandatory minimum sentence of imprisonment. We also decline to pass on the question, as the court did in *Ngemaes,* whether the Parole Board may parole a convict before the conclusion of his 15 year term of imprisonment. We leave those issues for another day.

CONCLUSION

For the foregoing reasons, we affirm the trial court's holding that it had no authority to order or recommend work release for the instant offense of firearms possession under 17 PNC § 3306.

[2] As the trial court correctly surmised that it was unable to order work release at sentencing, it follows that the trial court was also correct that it could not recommend work release to the Parole Board pursuant to 18 PNC § 1209(b) and 1211(a)(4).